

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 04-CR-80879-DT

BOB BEST,

Defendant.

**NOTICE OF INTENTION TO CONSTRUE "MOTION FOR RE-SENTENCING" AS A
MOTION UNDER 28 U.S.C. § 2255**

Pending before the court is Defendant Bob Best's "Motion for Re-Sentencing," filed on December 16, 2009. Defendant purportedly filed his motion pursuant to Federal Rule of Criminal Procedure 12(b), and asks that this court "vacate and set-aside its Judgment of Conviction . . . and to schedule a date for re-sentencing." (Def.'s Mot. at 1.) Having reviewed the motion, the court concludes that it is properly construed as a motion under 28 U.S.C. § 2255.

Under 28 U.S.C. § 2255, a prisoner sentenced by a federal court may "move the court which imposed the sentence to vacate, set aside or correct the sentence" when "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." While Defendant's motion does not reference § 2255, Defendant seeks the type of relief offered under § 2255. Thus, the court will construe the motion as one filed under § 2255.

However, the Supreme Court has held that district courts may not recharacterize or construe a pro se defendant's motion as the defendant's first § 2255 motion "unless the court informs the [defendant] of its intent to recharacterize, warns the [defendant] that the recharacterization will subject subsequent § 2255 motions to the law's 'second or successive' restrictions, and provides the [defendant] with an opportunity to withdraw, or to amend, the filing." *Castro v. United States*, 540 U.S. 375, 377 (2003). In light of *Castro's* directive, Defendant will be given an opportunity to amend or withdraw the motion within thirty days. The Government will thereafter be directed to respond to the motion. Accordingly,

IT IS ORDERED that Defendant is NOTIFIED of the court's intention to construe his December 16, 2009 "Motion for Re-Sentencing" [Dkt. # 48] as a motion under 18 U.S.C. § 2255. By **February 15, 2010**, Defendant may either withdraw the motion or file an amended motion under § 2255. If nothing is filed by February 15, 2010, the court will issue an order formally construing the motion as a § 2255 motion, and directing the Government to respond.

S/Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: January 15, 2010

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, January 15, 2010, by electronic and/or ordinary mail.

S/Lisa Wagner
Case Manager and Deputy Clerk
(313) 234-5522